

91-660

Supreme Court, U.S.  
FILED

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No.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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**DOWNTOWN AUTO PARKS, INC.,**

*Petitioner,*

v.

**CITY OF MILWAUKEE, a Municipal corporation,  
and WILLIAM RYAN DREW,  
Commissioner of the Department of City Development,**  
*Respondents.*

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**Petition For Writ Of Certiorari To The United  
States Court Of Appeals For The Seventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

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Does the First Amendment prohibit a city and its officials from denying a person a valuable governmental benefit in retaliation of that person's successful efforts in lobbying the state legislature not to enact a measure which was proposed by the city.

**PARTIES BELOW**

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The names of all parties to the proceedings in the Seventh Circuit Court of Appeals appear in the caption of the case. The Petitioner does not have a parent company or any subsidiaries.

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**OPINIONS BELOW**

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The opinion and judgment order of the Seventh Circuit Court of Appeals is reported at 938 F.2d 705 (7th Cir. 1991). The slip opinion is reproduced in the Appendix to this Petition at App. 1-12. The District Court opinion and judgment is unreported and is reproduced in the Appendix to this Petition at App. 13-21.

## **JURISDICTION**

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The judgment sought to be reviewed is dated and was entered July 23, 1991. The statutory provision which confers jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISION**

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### **U.S. Const. amend. I:**

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.

## **STATEMENT OF THE CASE**

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Downtown Auto Parks, Inc. (Downtown) is a Wisconsin corporation engaged in the business of operating parking lots. In 1982, the City of Milwaukee (the City) leased two parking structures to Downtown pursuant to Wis. Stat. § 66.079(1) (1981-82). This section, which required first class cities such as the City to lease revenue-producing parking lots to private persons unless reasonable lease terms and conditions were not available, provided in part as follows:

"If, in cities of the first class, a charge is made for parking privileges in such a [municipal] parking system or parking lot and attendants are employed thereat, such a parking system or parking lot shall be leased to private persons; but no such leasing shall be required if such city cannot obtain reasonable terms and conditions in such a lease."

The initial lease for each structure was for a two-year term and was renewed in 1984 for an additional two-year term.

The lease renewal process involved three steps. The first required the submission of a renewal request to the City Parking Commission (Parking Commission). The Parking Commission reviewed the request and either approved or rejected it. The second step involved approval of the Parking Commission's recommendation by the City Common Council (Common Council). The third step involved the signing of the lease by the Mayor.

Prior to the expiration of the second term of the leases, the Parking Commission, on January 6, 1986, recommended that Downtown's leases be extended again for an additional two-year term.

After the Parking Commission's favorable recommendation, Downtown learned that the City was lobbying the Wisconsin State Legislature to revise § 66.079(1). The City was seeking a revision eliminating the requirement that a first class city must lease its parking lots to private parties unless reasonable lease terms were unavailable. In the place of this requirement, the City wanted authorization allowing it to operate the parking lots through a management agent.

In an effort to defeat the City's proposal, Downtown hired a lobbyist, and Downtown's owner traveled to the

State Capitol to speak against the proposal. The proposal was defeated.\*

Shortly after this defeat, the Department of City Development (Department), at the behest of William Ryan Drew (Drew), its Commissioner, informed Downtown that the lease extension recommended by the Parking Commission in January, 1986, would not be granted based on the Department's conclusion that reasonable lease terms were not available.

In light of the Department's unsupported conclusion that reasonable lease terms were unavailable, the Common Council adopted a resolution authorizing parking services for the two lots to be provided pursuant to a management agreement. The City then awarded the management agreement for the two lots to System Parking, Inc. even though Downtown submitted the lowest bid.

Downtown commenced an action under 42 U.S.C. § 1983 in Milwaukee County Circuit Court, naming the City and Drew as defendants and alleging that their actions had deprived Downtown of its due process, free speech and equal protection rights. Downtown also claimed violations of Wisconsin and City of Milwaukee laws. The District Court had jurisdiction over the action under 28 U.S.C. § 1331.

After the case was removed to the United States District Court for the Eastern District of Wisconsin, defendants filed a motion for summary judgment as to Downtown's federal claims on the grounds that the complaint failed to state a claim upon which relief may be granted and that there was no genuine issue of material fact. The

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\* The following year, § 66.079(1) was amended in the manner desired by the City. See 1987 Wis. Laws 152 § 1.

District Court granted the defendants' motion for summary judgment as to all federal claims and dismissed them, remanding Downtown's state claims to the Milwaukee County Circuit Court for further proceedings. App. 21.

In the opinion supporting its judgment, the District Court stated that the City's acts of denying Downtown the lease extensions and the management agreements on the basis of the lobbying position taken by Downtown did not deprive Downtown of its First Amendment rights, concluding that this result was compelled by the cases of *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and *Triad Assoc., Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 129 (1990). Further, the District Court held that the defendants' actions did not deprive Downtown of a property interest without due process of law because Downtown had no property interest in the extension of the leases. App. 15-20.\*

Downtown appealed, and the Court of Appeals for the Seventh Circuit affirmed.

With respect to Downtown's First Amendment claim, the Court of Appeals concluded that the First Amendment did not forbid the City from refusing to enter into agreements with Downtown in retaliation for the adverse lobbying position taken by Downtown. Like the District Court, the Court of Appeals concluded that this outcome was compelled by the decisions of *LaFalce* and *Triad*.

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\* The District Court also concluded that Downtown had not been deprived of a liberty interest without due process of law or equal protection of the law in violation of the Fourteenth Amendment. App. 17-18. Downtown did not appeal from these rulings.

While the Court of Appeals recognized that this Court's recent decision in *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2927 (1990), undercut the validity of the reasoning of *LaFalce* and *Triad*, the Court of Appeals reaffirmed the validity of those cases. With respect to Downtown's Fourteenth Amendment due process claim, the Court of Appeals determined that Downtown had no protected property interest in the renewal of the leases. App. 5-11.

### REASON FOR GRANTING THE WRIT

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#### **THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.**

In this Court, Downtown presses only its First Amendment claim. This case comes before the Court upon the affirmance by the Court of Appeals of the District Court's grant of summary judgment against Downtown. Both the District Court and the Court of Appeals determined that granting summary judgment against Downtown was appropriate, concluding that Downtown's complaint failed to state a viable First Amendment claim. Thus, the issue in this Court is whether the allegations set forth in the complaint—that the City failed to renew Downtown's leases for the parking structures and failed to enter into management agreements for such structures with Downtown in retaliation of Downtown's act of lobbying the legislature on a public issue in opposition to the City's position—state a viable First Amendment claim. *See Perry*

*v. Sindermann*, 408 U.S. 593, 598 (1972).<sup>\*</sup> Downtown submits that a proper application of the relevant decisions of this Court compels the conclusion that the courts below decided this issue incorrectly.

The decisions of this Court have made it clear that the people have a First Amendment right to communicate with their legislators. *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271, 308 (1984) (Stevens, J., dissenting). In a representative democracy such as ours, the legislature (as well as the other branches of government) act on behalf of the people, thus the ability of a representative democracy to function is dependent upon the ability of the people to communicate their desires to the representatives. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137 (1961). The people have this right to inform their representatives in the legislature of their wishes regarding the passage of laws even though they seek to benefit themselves in doing so. In fact, people commonly lobby their representatives in an effort to advance their own objectives, thereby providing the legislature with valuable information on the topic being considered. *Id.* at 139. Thus, Downtown was exercising a right secured by the First Amendment in opposing the City's proposal in the State Legislature.

By denying Downtown the lease extensions and management agreements on the basis of its exercise of a constitutionally-protected right, the City and Drew penalized the exercise of such right. In *Perry v. Sindermann*, this Court recognized that allowing government to deny valuable bene-

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<sup>\*</sup> The First Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

fits because of the exercise of a constitutionally-protected right frustrates the exercise of that right.

[The government] may not deny a benefit to a person on a basis that infringes his constitutionally-protected interests—especially his interests in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”

*Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Because the actions of the City and Drew in denying the lease extensions and management agreements in retaliation of Downtown’s lobbying efforts penalized Downtown’s First Amendment freedoms, such actions were constitutionally impermissible. *Perry*, 408 U.S. at 597.

The court below found the retaliatory actions of the City and Drew constitutionally permissible under *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). While recognizing a conflict between *LaFalce* and this Court’s more recent decision in *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2927 (1990), the court below ruled that *LaFalce* was controlling. A close analysis of *LaFalce* makes it evident that the court below was in error in finding *LaFalce* controlling in the case at hand.

*LaFalce* involved the bidding process in which numerous independent contractors participate prior to the award of a public contract. The court concluded that the First Amendment was not violated where the Mayor of a city caused the city to award a public contract to a particular bidder because that bidder was a political supporter of

the Mayor, thereby denying the award to a bidder who did not support the Mayor. *LaFalce*, 712 F.2d at 293. Recognizing that the practice of favoring political supporters in awarding public contracts interfered with the free exercise of speech, the court nevertheless determined that such practice was not unconstitutional, reasoning that such practice interfered minimally with the exercise of First Amendment rights and the consequences of trying to prevent the interference through an interpretation of the Constitution were undesirable. *LaFalce* at 293-94. The court characterized the First Amendment interests of the independent contractors as "attenuated" because most protected themselves from the effects of political patronage by supporting both political parties. In the court's view, a rule prohibiting political patronage from playing a role in the contracting process would have little impact due to this "cautious neutrality" exercised by independent contractors. Moreover, the court noted that the losers could simply contract with other entities. According to the court, attempting to reduce the current level of political patronage in the contracting process was beyond the capacity of the judiciary, especially in light of the fact that a contrary decision would create a federal cause of action for every bidder who was not awarded a contract. *LaFalce* at 294.

The case at hand involves none of the concerns raised by the court in *LaFalce*. Downtown is not an independent contractor asking this Court to rid the government contracting bid process of political patronage. The statute in question required the City to lease to private persons. Downtown protected its interests by successfully lobbying against the efforts of the City to amend this statute, and the City retaliated. 1

Downtown, as an extended lessee, had been approved for another extension and was not in competition with other "independent contractors" for the extension. Likewise, there were no other entities with which Downtown could contract. Downtown is engaged in the business of operating municipally-owned parking lots in the City. When Downtown was forced into the management agreement bid process it had already been penalized in the lease extension process because of the exercise of its First Amendment rights.

The First Amendment interests in this case are important and readily identifiable, not attenuated. Protecting these interests is well within the realm of judicial capability and would not lead to endless litigation.

## CONCLUSION

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Downtown exercised its First Amendment right in communicating to the legislature its beliefs on a public issue. The City, the loser in the political process, penalized Downtown's First Amendment freedoms by denying a valuable governmental benefit in retaliation. This was impermissible under this Court's decision in *Perry v. Sindermann*.

The reasoning of *LaFalce v. Houston* is not controlling on these very distinct facts. This case does not involve an assault on the institution of political patronage. To recognize the deprivation of Downtown's vital First Amend-

ment right and to allow Downtown to present its case to a jury would not result in an outburst of litigation.

Certiorari should be granted.

Respectfully submitted,

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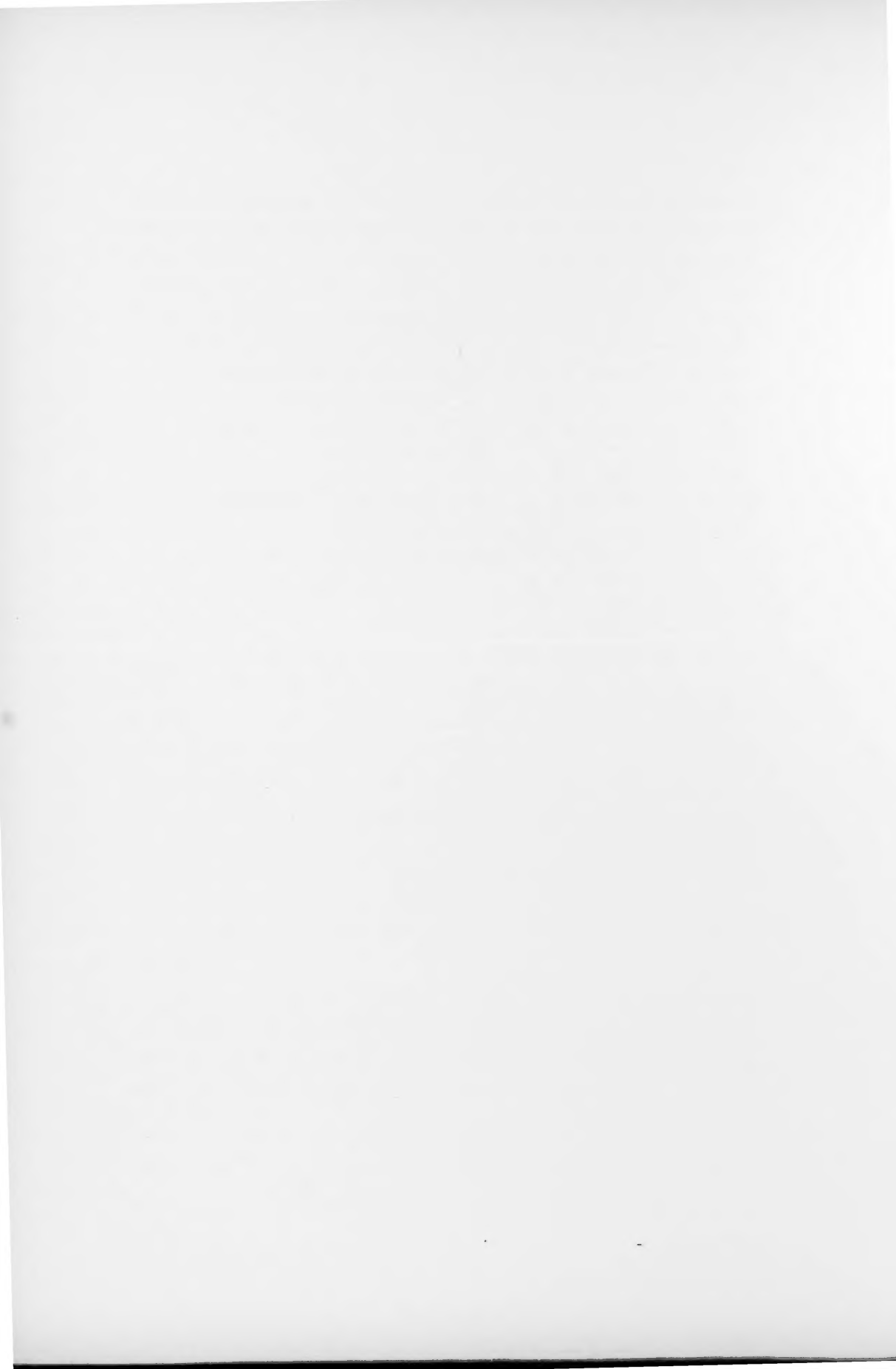
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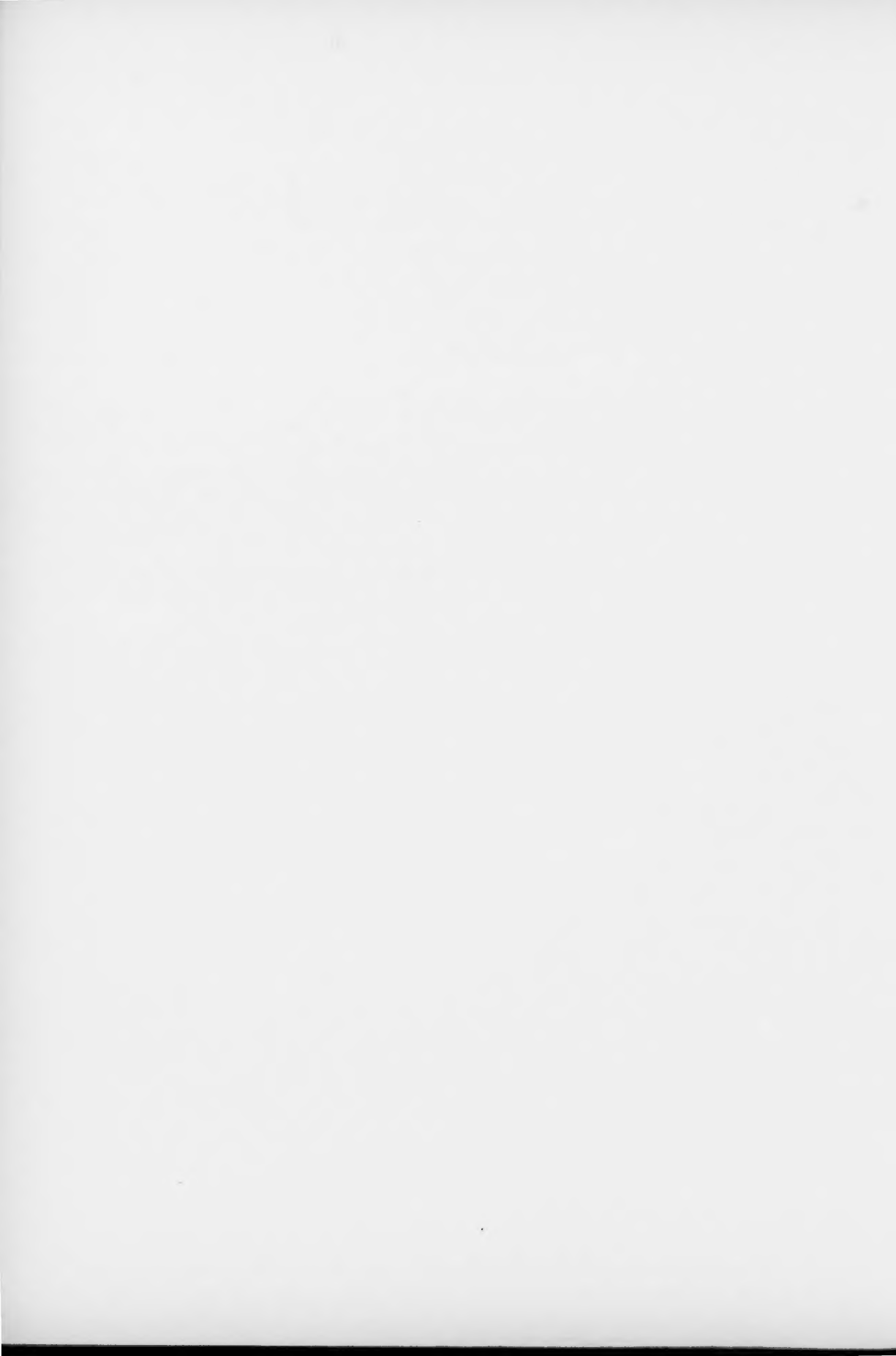
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*Attorneys for Petitioner*

Dated: October 16, 1991



# **APPENDIX**



App. 1

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No. 90-3832

DOWNTOWN AUTO PARKS, INC.,

*Plaintiff-Appellant,*

*v.*

CITY OF MILWAUKEE and WILLIAM R. DREW,  
Commissioner of the  
Department of City Development,

*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Eastern District of Wisconsin.  
No. 88 C 874—Terence T. Evans, Judge.

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ARGUED MAY 6, 1991—DECIDED JULY 23, 1991

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Before CUMMINGS and EASTERBROOK, *Circuit Judges*,  
and WILL, *Senior District Judge*.\*

CUMMINGS, *Circuit Judge*. Plaintiff Downtown Auto Parks brought this suit for damages pursuant to 42 U.S.C. § 1983 alleging *inter alia* that defendants infringed plaintiff's First and Fourteenth Amendment rights by refusing to renew two parking lot leases. On defendant's motion for summary judgment, the district court dismissed the complaint. We affirm the dismissal.

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\* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

## App. 2

Plaintiff Downtown Auto Parks operates parking facilities. The City of Milwaukee ("City") leased the McArthur Square and Milwaukee Area Technical College ("MATC") parking structures to Downtown Auto Park's predecessor company on July 31, 1982. Wis. Stat. § 66.079 requires the City to lease its revenue-producing parking lots to private persons, unless it cannot obtain reasonable terms and conditions. The pertinent portion of the statute provides:

66.079. Parking Systems. (1) \* \* \* If, in first class cities, a charge is made for parking privileges in a parking system or parking lot and attendants are employed there, the parking system or parking lot shall be leased to private persons. No leasing is required if the 1st class city cannot obtain reasonable terms and conditions.

Wis. Stat. § 66.079 (1985-1986). In 1984 the City renewed the initial two-year leases with Downtown Auto Parks for another two-year term. In January 1986, with the expiration of the second term approaching in July 1986, the Milwaukee Parking Commission recommended that the McArthur Square and MATC leases be extended again until July 31, 1988.

Subsequent to the Parking Commission's favorable recommendation, Downtown Auto Parks learned that the City was lobbying to have the Wisconsin state legislature revise Section 66.079 of the Wisconsin statutes to allow the City to retain companies to manage the lots without leasing them. Downtown Auto Parks lobbied against that change and the City's effort ultimately was defeated.<sup>1</sup> On May 23, 1986, the Department of City Development, at the direction of defendant William R. Drew, its Commissioner, notified Downtown Auto Parks that the City had

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<sup>1</sup> It was not until the following year that the statute was amended in the manner proposed by the City. See 1987 Wis. Acts 152 § 1.

rejected the Parking Commission's recommendation and would not be granting renewal of the leases expiring on July 31, 1986. The City instead adopted a resolution authorizing the hiring of System Parking, Inc. as a management agent for the lots and stating that a management contract was necessary because reasonable lease terms could not be obtained.

Downtown Auto Parks brought suit against Drew and the City in the Circuit Court of Milwaukee County, claiming that defendants had deprived plaintiff of its due process, equal protection, and free speech rights by failing to renew the leases for the lots. Downtown Auto Parks alleged in addition that the City's conduct violated Wisconsin state statutes and the Milwaukee city charter.

The case was removed to the Eastern District of Wisconsin, and defendants filed a motion for summary judgment on the ground that the complaint failed to state any viable federal constitutional claims. The district court granted that motion and filed a supporting opinion. Judge Evans first ruled that plaintiff had not been deprived of property without due process of law in contravention of the Fourteenth Amendment since it did not have a property interest in the extension of the leases. There being no prior agreement to extend the leases, no property was taken away. As to plaintiff's claim that the City's refusal to extend the leases violated the First Amendment, the district judge relied on *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), certiorari denied, 464 U.S. 1044, and *Triad Assoc., Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), certiorari denied, 111 S. Ct. 129, holding that independent contractors such as plaintiff enjoy no First Amendment protection from a city's use of political criteria in awarding public contracts. Judge Evans found in addition that the equal protection claim was insufficiently articulated to withstand summary judgment. Plaintiff appealed, seeking review only of the district court's findings with respect to the plaintiff's First and Fourteenth

Amendment claims.<sup>2</sup> Finding the district court's assessment of the claims to be correct, we affirm.

### *Appellate Jurisdiction*

At the oral argument, we questioned whether this Court had jurisdiction over the appeal. Judge Evans granted defendants' motion for summary judgment as to all federal claims, but simultaneously remanded the pendent state claims to the Milwaukee County Circuit Court for further proceedings, raising a question about finality. Subsequently both parties have informed us<sup>3</sup> that this Court has jurisdiction to hear the appeal of the portion of the judgment dismissing plaintiff's federal claims.<sup>4</sup> The precise proposition is supported by *Briggs v. American Air Filter Co.*, 630 F.2d 414, 416 n.1 (5th Cir. 1980) (entry of summary judgment appealable despite the remand of other claims to state court). In *Allen v. Ferguson*, 791 F.2d 611 (7th Cir. 1986), this Court cited *Briggs* and held that an order logically preceding the remand and necessitating a remand to state court of the remainder of the case is reviewable. *Id.* at 613-614 (order dismissing defendant whose diverse citizenship formed basis for federal jurisdiction reviewable); see also *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (same). Therefore we have jurisdiction here.

<sup>2</sup> These are the only matters appealed. Plaintiff in Count II of the amended complaint alleged that the City had also violated its First and Fourteenth Amendment rights by terminating a month-to-month lease held on a lot at 724 N. Second Street. Because on appeal plaintiff makes no arguments with respect to this third lot, we consider any appealable issue regarding the lot waived.

<sup>3</sup> The parties were asked to submit supplemental briefs on this issue.

<sup>4</sup> The remand order itself is non-reviewable pursuant to 28 U.S.C. § 1447(d).

*First Amendment Claim*

The theory of the plaintiff's First Amendment claim is that it lost the two parking facility operations in 1986 because of its lobbying efforts and that this "retaliatory discharge" violated the First Amendment. See *Perry v. Sindermann*, 408 U.S. 593, 597 (government may not deny benefit to a person on a basis that infringes his or her constitutionally protected interests).

The adjudicated cases in this Circuit do not extend First Amendment protection to independent contractors whose bids for public contracts are rejected on the basis of their political views. We examined a similar problem in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), certiorari denied, 464 U.S. 1044, a case which involved a company's bid to install and maintain benches along Springfield city streets. The company alleged that Springfield had hired a competitor sign company simply because it was a political supporter of the mayor. We held that the First Amendment does not forbid a city from using political criteria in awarding public contracts to independent contractors. While recognizing that certain public employees are protected from retaliatory employment decisions, see *Elrod v. Burns*, 427 U.S. 347; *Branti v. Finkel*, 445 U.S. 507, a panel of this Court drew a distinction between independent contractors and public employees. The panel surmised that independent contractors generally tend to be less dependent on government jobs than are public employees. *LaFalce*, 712 F.2d at 294. It also noted that firms having extensive government business are often "political hermaphrodites" having extensive connections to both major parties to protect themselves. *Id.* In this scenario of cultivated political neutrality, a judicial rule imposing political impartiality would have little effect. *Id.* Finally, the Court was swayed by a practical consideration: a rule upholding a company's First Amendment right to have its bid considered without regard to politics would "invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.* Seven years after *LaFalce*, we reaffirmed its holding in *Triad Assoc., Inc. v. Chicago*

*Housing Authority*, 892 F.2d 583 (7th Cir. 1989), certiorari denied, 111 S. Ct. 129.

Under *LaFalce* and *Triad*, the First Amendment did not forbid Milwaukee from considering plaintiff's adverse lobbying efforts in refusing to extend its leases. Pressed to distinguish its case from this Circuit's precedents, Downtown Auto Parks argues that it was not involved in a bidding situation, insisting that it had an existing lease which was terminated.

Plaintiff's characterization is clearly incorrect even if we assume that plaintiff is drawing a distinction relevant to First Amendment analysis. The City chose not to extend Downtown Auto Parks' lease beyond the lease term, which ended in July 1986. It did not breach any contract with Downtown Auto Parks or deprive it of an existing benefit. Upon expiration of Downtown Auto Parks' leases, the City was free to consider leasing to any company that would supply reasonable terms, see Wis. Stat. § 66.079. The statute requires the City to lease lots if it can find reasonable terms, but does not force it to lease to any particular party. The City's refusal to renew Downtown Auto Parks' lease a second time was thus a refusal of one possible bid. This case falls squarely under the holdings of *LaFalce* and *Triad*.<sup>5</sup>

A more pertinent objection to application of *LaFalce* and *Triad* is that the recent Supreme Court case *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, has cast doubt on the validity of the reasoning in those cases. *Rutan* significantly extended First Amendment protection in the political patronage context. The Supreme Court re-

<sup>5</sup> Downtown Auto Parks also tries to distinguish *LaFalce* and *Triad* by pointing out that in this case plaintiff allegedly has been retaliated against because it chose to exercise its free speech rights and not on the basis of party affiliation. The *Elrod* and *Branti* analysis is unchanged, however, in situations where the government retaliates against protected speech. See, e.g., *Mt. Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274.

jected the view taken by this Court that the First Amendment only barred patronage practices substantially equivalent to a dismissal. See *Rutan v. Republican Party of Illinois*, 868 F.2d 1396 (7th Cir. 1988) (en banc), reversed, 110 S. Ct. 2927, on remand, 916 F.2d 715 (7th Cir. 1990). The Court instead held that hirings, transfers, promotions and recalls after layoffs based on political affiliation and support are an impermissible infringement on the First Amendment rights of public employees. 110 S. Ct. at 2737, 2739.

Although *Rutan* directly addresses only the plight of government employees and says nothing about the First Amendment rights of independent contractors, the scope of *Rutan*, and rationale behind it, seem to be at odds with the holding of *LaFalce* and *Triad*. Most importantly, we expressed in *LaFalce* a concern about flooding the federal courts with new First Amendment claims. The Supreme Court apparently has less fear of the expansion of litigation in this area for in *Rutan* it explicitly granted disappointed applicants, as well as discharged employees, a cause of action.

While recognizing that *Rutan* has altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based, we affirm the continued validity of those earlier cases. *Rutan* did extend First Amendment protection, but only within the context of government employment. *Rutan* was the culmination of a line of cases "concerned only with the constitutionality of dismissing public employees for partisan reasons." *Elrod*, 427 U.S. at 353. All circuits considering the question of whether to extend the holdings of *Elrod* and *Branti* to independent contractors have declined. See *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir. 1982), certiorari denied *sub nom. Schenberg v. Bond*, 459 U.S. 878; *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986). Since *Rutan* was decided, the Sixth Circuit has also refused to prohibit the government from considering political criteria in awarding of public contracts. See *Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir. 1989), vacated, 882 F.2d 207 (6th Cir. 1989), reinstated

in part, 924 F.2d 627 (6th Cir. 1991) (en banc), certiorari denied, 59 U.S.L.W. 3865 (U.S. June 25, 1991) (No. 90-1594). We continue to concur in the view taken by the other circuits, and hold that political favoritism in the awarding of public contracts is not actionable.

As a last resort, plaintiff relies on *Lipinski v. Dietrich*, 578 F. Supp. 235 (N.D. Ind. 1984),<sup>6</sup> a case in which an independent contractor was permitted to maintain his First Amendment claim that he was the victim of a politically motivated discharge. Assuming that *Lipinski* was correctly decided, the case by its terms is limited to a situation where an individual is "discharged solely because of speech-related disagreements with the police," 578 F. Supp. at 240, and so cannot aid the plaintiff here.

In sum, plaintiff's First Amendment claim must be dismissed because the City was not prohibited from allowing politics to influence its decision not to award a contract to plaintiff.

#### *Fourteenth Amendment Claim*

Plaintiff's other argument is that it had a sufficient property interest in the continuation of the leases to warrant protection under the Fourteenth Amendment's due process clause. The due process analysis is familiar. The threshold requirement for a successful due process claim is the deprivation of a liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 569. To have a property interest protected by the Fourteenth Amendment, "a person \* \* \* must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Moreover, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

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<sup>6</sup> Throughout both its briefs, plaintiff mistakenly calls it *Lapinski v. Dietrich*.

Downtown Auto Parks clearly had a unilateral expectation of renewal of the leases. Recognizing that the expectation is an insufficient interest to warrant Fourteenth Amendment protection, plaintiff argues that it had in addition: 1) a legitimate claim of entitlement to its lease extension; 2) an implied contract for an extension with the City even if it had not obtained renewal explicitly. These arguments have no merit.

As was explained above, Downtown Auto Parks was not "entitled" to any extension. The two leases expired in July 1986. Reading the terms of the leases otherwise to bind the parties to renewal would "convert a short-term business arrangement into a lifelong marriage," as the district judge pointed out. *Downtown Auto Parks, Inc. v. The City of Milwaukee*, No. 88 C 874 (E.D.Wis. Nov. 13, 1990) (Decision and Order). Under Section 66.079 of the Wisconsin statutes, the City was free to lease the parking lots to any private persons. Since the City had discretion to award the leases to a competitor of plaintiff, plaintiff had no property subject to Fourteenth Amendment protection. *Roth*, 408 U.S. at 578 (professor's employment contract silent on issue of reemployment does not create entitlement absent state statute or University rule securing interest in same); *Scott v. Village of Kewaskum*, 786 F.2d 338, 339-340 (7th Cir. 1986) (to the extent an interest appeals to discretion rather than rules, there is no property).

In some circumstances, a failure to renew a contract can amount to a deprivation of property. In *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), this Court held that a person had a due process right not to be deprived of the renewal of his or her Illinois liquor license. Our holding with respect to Downtown Auto Parks' leases is not inconsistent with *Reed*. The principle is the same and requires the separation of "what is securely and durably yours under state \* \* \* law" from "what you hold subject to so many conditions as to make your interest meager." *Reed*, 704 F.2d at 948. In *Reed*, the requirements for a liquor license, as set by state laws, were so undemanding

as to suggest that "the legislature expected most licenses to be renewed as a matter of course." *Id.* There is no comparable suggestion in Section 66.079 that applicants will be safeguarded from arbitrary non-renewal. Plaintiff thus had no protected property interest in renewal of the parking lot leases.

Plaintiff argues that "at the very least there was an implied in fact agreement between Downtown Auto Parks and the City for an extension" (Pl. Br. 19). See *Perry*, 408 U.S. at 601-602 (contract implied under state law can create protected property interest even in absence of written contract). Plaintiff points to promises made by City employees and the recommendation of renewal made by the Parking Commission as actions by which the City indicated it was willing to be bound.

Plaintiff's implied contract argument fails because in Wisconsin a contract cannot be implied to bind a municipality "if such implication would conflict with a statute prescribing a mode of contracting by which alone a city could bind itself." *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 570, 113 N.W. 44, 47 (1907). Section 66.079 states that the City is the proper party to authorize execution of the lease. City officers can execute leases only if authorized by the city council. *Kranjec v. West Allis*, 267 Wis. 430, 435, 66 N.W.2d 178, 181 (1954). The Parking Commission is merely an advisory body whose function is limited to the making of recommendations. Ch. 23.01 (4) of City of Milwaukee Charter. Under Wisconsin law, Downtown Auto Parks was simply not entitled to rely on the actions of city officers or the Parking Commission, absent authorization from the City Council.

The City's refusal to continue doing business with this independent contractor did not violate the First Amendment or the Fourteenth Amendment. Plaintiff's true problem was not that its free speech rights were infringed or that it was deprived of property without due process of law. In its clearest statement of its dilemma, Downtown

Auto Parks notes that the City "revers[ed] the recommendation of the Parking Commission without a factual basis" (Pl. Br. 18). Plaintiff also is frustrated that the City declared itself unable to find reasonable lease terms without explaining how the terms offered by Downtown Auto Parks were unreasonable. Something in the City Charter or in Wisconsin state law may forbid the abrupt, silent about-face executed by the City, thus saving the plaintiff's state law claims in state court. This suit, however, was properly dismissed.

Judgment affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: July 23, 1991

BEFORE:

Honorable Walter J. Cummings, Circuit Judge  
Honorable Frank H. Easterbrook, Circuit Judge  
Honorable Hubert L. Will, Senior District Judge\*

No. 90-3832

DOWNTOWN AUTO PARKS, INCORPORATED,

Plaintiff-Appellant

v.

CITY OF MILWAUKEE and WILLIAM R. DREW, Commis-  
sioner of the Department of City Development,

Defendants-Appellees

Appeal from the United States District Court  
for the Eastern District of Wisconsin  
No. 88 C 874, Judge Terence T. Evans

This cause was heard on the record from the above  
mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND AD-  
JUDGED by this Court that the judgment of the District  
Court in this cause appealed from be, and the same is  
hereby, AFFIRMED, with costs, in accordance with the  
opinion of this Court filed this date.

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\* The Honorable Hubert L. Will, Senior District Judge for the  
Northern District of Illinois, is sitting by designation.

App. 13

[FILED NOVEMBER 13, 1990]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

DOWNTOWN AUTO PARKS, INC.,  
a domestic corporation,

Plaintiff,

v.

Civil Action  
No. 88-C-874

THE CITY OF MILWAUKEE,  
a municipal corporation,  
and WILLIAM RYAN DREW,  
Commissioner of the Department  
of City Development,

Defendants.

---

DECISION AND ORDER

This lawsuit, originally filed in the Milwaukee County Circuit Court and removed here by the defendants, concerns a dispute between the parties over the operation of various municipally owned parking facilities in the City of Milwaukee. The defendants, the City of Milwaukee and William Drew, the former commissioner of the Department of City Development, have moved for summary judgment. As to the federal claims, the motion will be granted. The state claims will not be considered. Rather, the case will be remanded to the Milwaukee County Circuit Court for further proceedings.

Downtown Auto Parks, Inc. was founded in 1983. Its mission was to operate parking facilities. It apparently assumed the operations of a predecessor corporation, J.V.

Parking, which got involved in running various parking lots for the City of Milwaukee in 1982.

As to three of the City of Milwaukee's parking facilities—one located at MacArthur Square, one at the Milwaukee Area Technical College and one on North Second Street—lease agreements were arranged and Downtown ran the structures either on the leases or various extensions of them until either 1987 or 1988.

Up until the time that relations between the parties ruptured, Downtown's leasing of the parking facilities was carried out in conformity with Wisconsin Statute § 66.079. Prior to March 17, 1988, section 66.079 provided that the City of Milwaukee lease the operation of its parking facilities to private persons provided that reasonable lease terms and conditions could be arranged. The statute was amended, effective March 17, 1988, to require the city to run its parking facilities under a contract with private operators if reasonable terms and conditions could be obtained.

Apparently, the City of Milwaukee did not like the Wisconsin law in 1986. It lobbied for a change in the law to release it from the obligation to lease its parking facilities to private parties if "reasonable rates" could be obtained. The city wanted the flexibility of being able to arrange management contracts for the facilities instead of leases regardless of whether it would have been able to obtain reasonable lease rates.

Although the City of Milwaukee did not like the Wisconsin law as it existed, Downtown Auto Parks did. It lobbied the legislature to keep the law as it was. Eventually, when the law was changed, Downtown Auto Parks was moved out of the facilities it was operating in favor of management contracts with different providers. Downtown

says that this action violated its constitutional rights and various rights secured to it under state law. In addition, Downtown alleges that it was denied equal protection under the fourteenth amendment because it was treated differently than a competitor, Michael Anthony Parking, Inc., a lessee of another city parking facility located on Milwaukee Street.

Although the city may dispute some of the facts alleged in the plaintiff's complaint, it is willing to assume that they are correct for purposes of the motion for summary judgment. Even assuming those facts to be true, the city contends that there is no basis for the federal court claims that Downtown is making. I agree with the city.

Downtown's federal claims arise under 42 U.S.C. § 1983. To establish a claim under section 1983, a plaintiff must prove (1) that a defendant deprived him of a right secured by the Constitution and (2) that the defendant acted under color of state law. The second element is established in this case, but the first one isn't.

Three of the four federal constitutional claims are based on the fourteenth amendment to the United States Constitution. Particularly, Downtown contends that its due process rights (both liberty and property) and its equal protection rights under the fourteenth amendment have been violated. It also contends that its free speech rights under the first amendment have been abridged.

### *Property Interest*

The fourteenth amendment provides that no citizen may be deprived of life, liberty or property without due process of law. Downtown claims that it had a property interest in the extension of its leases at the three city parking structures. Those rights, it says, were violated when

the city refused to extend the "existing" leases. Unfortunately for Downtown, it did not have a property interest in the extension of the leases.

To have a property interest in a benefit, the Supreme Court has said, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court of Appeals for the Seventh Circuit has described property as "what is securely and durably yours under state . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain . . . ." *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983). "To the extent a request appeals to discretion rather than to rules, there is no property." *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986).

Downtown claims that its interests in the extension of the leases are analogous to government-issued licenses. Well, they're close, but not close enough to win the cigar. Downtown cites cases holding that a business license, like a gun or liquor license, is property which cannot be taken away by the state until the end of a definite period, absent proof of misconduct. This is generally true. Downtown, however, does not allege that its leases were "taken away" before the end of a definite period. The city simply chose not to extend the lease agreement beyond its term. And that was O.K. because there was no prior agreement to extend the leases.

Of course, in certain instances a failure to renew a license can be the same as a revocation of it. *Reed*, 704 F.2d 943, 949. That sort of situation occurs in a setting where licenses are usually renewed as a matter of course. To give that kind of protection to a city-owned parking

lot leasee would convert a short-term business arrangement into a lifelong marriage. No property interest recognized by the fourteenth amendment is present in this case.

### *Liberty Interest*

Downtown also tepidly claims that the city and Mr. Drew interfered with its liberty rights guaranteed by the fourteenth amendment. In order for this claim to survive, Downtown must show that it had a liberty interest subject to the requirements of due process in the extension of the parking structure leases, and that the city's refusal to extend the leases deprived it of that interest.

The concept of liberty generally includes human abilities that do not depend on the government—such things as freedom from restraint, the right to associate with others, the right to travel, and the right to work for a living in the common occupations of the community. *See Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986), affirming my decision finding no property or liberty interests in the denial of a liquor license. Because the actions of the defendants here only precluded Downtown from running a parking lot for the city, as opposed to generally running parking lots, no liberty interest recognized by the fourteenth amendment is infringed.

### *Equal Protection*

It is not entirely clear what Downtown contends in regard to its equal protection claim. In the amended complaint, it alleged general disparate treatment between it and a similarly situated Milwaukee business, Michael Anthony Parking, Inc. In its brief on this motion it claims that it is the victim of gender discrimination. Although not alleged with sufficient particularity in its amended

complaint, I will consider Downtown's denial of equal protection to be a claim of gender discrimination.

Downtown's principal owner (or one of them) is Judith Panacek, a female. Michael Anthony Parking, owned by Michael Iannelli, a male, is another parking facility operator doing business in Milwaukee. Michael Anthony Parking was granted a lease extension for the Milwaukee Street parking structure during the same period that the city denied the lease extension to Downtown for its Second Street parking structure. On this basis, Downtown claims the city violated its right to equal protection because sex discrimination was at work. Say that again? Is that all? One needs more than a naked and unsupported allegation like this to get passed a summary judgment. This empty claim cannot stand.

#### *First Amendment*

Downtown lobbied the Wisconsin Legislature, as did the City of Milwaukee, on the subject of section 66.079. The city urged that the law be changed to give it more power in deciding how to administer its parking lots. Downtown argued that the law should not be changed. It was a political issue. Downtown now alleges that the city and Mr. Drew sought to punish it for lobbying against the city's interest when it refused to grant Downtown lease extensions or management contracts. Downtown claims that the defendants thus deprived it of its right to free speech as guaranteed by the first amendment.

The court of appeals for this circuit has refused to extend first amendment protection to independent contractors. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). The court has ruled that the first amendment does not prohibit a city's use of political criteria in awarding public contracts. Moreover,

the court has extended this rule to suits by unsuccessful bidders seeking public contracts. *Triad Assoc., Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989).<sup>1</sup>

In *LaFalce*, the court held that the first amendment did not protect a contractor whose bid for a public contract was rejected solely because the owners of the business were not political supporters of the mayor. The court ruled that there is a difference between the first amendment interests of "independent contractors" and "public employees" in this context.

In *Triad*, the court held that independent contractors enjoyed no first amendment protection from the city's use of political criteria in awarding public contracts. The court affirmed the district court's finding that the plaintiff had failed to state a claim for relief on this point pursuant to section 1983. *Triad*, 892 F.2d at 586-587.

Downtown's business status with the City of Milwaukee is unquestionably one of independent contractor. The facts in this case and *LaFalce* and *Triad* are close. Although Downtown was not refused a lease extension or management contract because of support for one political group or another, taking its allegations as true, it was denied the lease or contract because it lobbied against the interests of an incumbent political organization. In *LaFalce*, *Triad*, and this case, the unsuccessful independent contractor was allegedly retaliated against because of speech. In each case, the speech regarded some aspect of the political process. In this case, on this point, I must conclude that

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<sup>1</sup> The appellate court, as well as other courts, have refused to extend the Supreme Court's holding in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), wherein the Court held that nonpolicymaking, nonconfidential public employees could not be discharged or threatened solely upon the ground of political belief or speech.

Downtown is not protected by the first amendment. Therefore, the city and Mr. Drew are entitled to summary judgment as a matter of law on all of the plaintiff's federal constitutional claims.

*The State Law Claims*

This suit also contains several state law claims. Generally, Downtown claims that the city has violated Wisconsin law and the Milwaukee charter. Furthermore, Downtown claims that the city breached an implied-in-fact contract with it to run the parking facilities by lease. Downtown has also alleged that the city did not follow appropriate procedures in evaluating management contract bids.

The claims under state law appear to be much stronger (this is not much of a trick) than those raised under the federal Constitution. Perhaps that is why the plaintiff wanted to litigate this case in state court. Now, with the federal claims resolved, no reason exists why I should exercise pendent jurisdiction over the state claims. They should go back to where the plaintiff wanted to air them in the first place.

(1) The defendants' motion for summary judgment as to all federal claims is GRANTED. They are DISMISSED.

(2) The remainder of the claims, all state matters, are ordered REMANDED to the Milwaukee County circuit court for further proceedings.

Dated at Milwaukee, Wisconsin, this 13 day of November, 1990.

BY THE COURT:

/s/ Terence T. Evans  
TERENCE T. EVANS  
UNITED STATES  
DISTRICT JUDGE

App. 21

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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JUDGMENT IN A CIVIL CASE

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Docket Number: 88-C-874

Name of Judge: TERENCE T. EVANS

Case Title: Downtown Auto Parks, Inc. v.  
The City of Milwaukee, et al.

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- ☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants' motion for summary judgment as to all federal claims is granted. They are dismissed.

The remainder of the claims, all state matters, are ordered remanded to the Milwaukee County Circuit Court for further proceedings.

Date November 13, 1990

Sofron B. Nedilsky  
*Clerk*

/s/ Regina Torcivia  
*(By) Deputy Clerk*

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No. 91-660

FILED

NOV 13 1991

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1991

—————◆—————  
DOWNTOWN AUTO PARKS, INC.,

*Petitioner,*

v.

CITY OF MILWAUKEE, a municipal corporation,  
and WILLIAM RYAN DREW, Commissioner of  
the Department of City Development,

*Respondents.*

—————◆—————  
**Petition For Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit**

—————◆—————  
**RESPONDENTS' BRIEF IN OPPOSITION**

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November 13, 1991



## QUESTION PRESENTED

Do independent contractors soliciting business from the government have the same protection under the First Amendment as public employees?

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No. 91-660

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In The  
**Supreme Court of the United States**  
October Term, 1991

---

DOWNTOWN AUTO PARKS, INC.,  
*Petitioner,*  
v.

CITY OF MILWAUKEE, a municipal corporation,  
and WILLIAM RYAN DREW, Commissioner of  
the Department of City Development,  
*Respondents.*

---

Petition For Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit

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**RESPONDENTS' BRIEF IN OPPOSITION**

---

**I. STATEMENT OF THE CASE**

Respondents, City of Milwaukee and William Ryan Drew (hereinafter "City" and "Drew"), accept petitioner's, Downtown Auto Parks, Inc. (hereinafter "Downtown"), statement of the case, except as noted in the paragraph below. Respondents further accept Downtown's appendix and will make reference to it in the same manner used by Downtown (App. \_\_\_\_).

In the course of its argument, Downtown attempts to remove itself from the category of independent contractor and place itself into the category of a person who has a

claim of entitlement to property by stating that it was an "extended lessee" which had been "approved" for another extension of a lease and, therefore, was not in competition with other independent contractors for City business. (Pet. 11-12). The approval referred to by Downtown was a favorable recommendation by the City's Parking Commission, which had the authority to recommend to the City's Common Council, but not award, parking leases and contracts. (Pet. 3; App. 2, 16). Accordingly, both the District Court and the Seventh Circuit found that Downtown had no property interest in its expired leases. (App. 8-11, 15-17). Downtown has not contested this finding and, accordingly, is now foreclosed from arguing that its status was anything other than that of an independent contractor which was in competition with other independent contractors for City business. (Pet. 6).



## **II. REASONS WHY THE PETITION SHOULD NOT BE GRANTED**

The petition should not be granted because the Seventh Circuit's decision (1) does not conflict with any decision of this court, (2) follows an unbroken line of authority, and (3) was correctly decided.

### **A. The Seventh Circuit's Decision Does Not Conflict With Any Decisions Of This Court.**

Downtown argues that the Seventh Circuit decided this case in a way that conflicts with *Perry v. Sindermann*,

408 U.S. 593 (1972). *Downtown* asserts that the statement in *Perry* that “[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.” *id.* at 597, means that independent contractors seeking governmental business are entitled to the same protection under the First Amendment as are public employees who have no proprietary rights to their jobs. *Perry*, however, did not address the question of whether independent contractors seeking governmental business enjoy the same protection under the First Amendment as employees of the government. *Perry* concerned an employee of the government who alleged that his employment was not continued as a result of protected activities he undertook while employed by the government. *Id.* at 594-595. By rejecting a distinction between public employees who have proprietary rights to their jobs and public employees who do not, this Court held that the nature of the employment relationship was not relevant to deciding the extent of protection afforded public employees under the First Amendment. *Id.* at 597-598.

Because a public employee’s criticism of his superiors on matters of public concern is constitutionally-protected speech, distinctions among employees based upon the nature of their employment relationship would deprive employees who do not have a proprietary interest in their jobs of First Amendment protection. *Perry*, therefore, extended First Amendment protection to public employees who do not have a proprietary interest in their jobs. Otherwise, as recognized in *Perry*, the government could avoid the prohibitions of the First Amendment by

defining the employer-employee relationship in a non-proprietary fashion and thereby "produce a result which [it] could not command directly." *Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). *Perry* did not, as alleged by Downtown, extend the First Amendment protection to all persons who have a contractual relationship with the government or, as is the case here, persons who have no contractual relationship with the government but seek to enter into one. The Seventh Circuit's decision in this case, therefore, does not conflict with *Perry*.

#### B. The Seventh Circuit's Decision Follows An Unbroken Line of Authority.

The distinction between public employees and soliciting independent contractors in the context of the First Amendment has been made by four circuit courts, all of which have held that the protection of the First Amendment enjoyed by public employees does not extend to independent contractors which are seeking business from the government.

In *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982), and *Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982), the Eighth Circuit refused to extend to independent contractors the Court's holding in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), that public employees are protected by the First Amendment from discharge solely because of partisan political affiliation or nonaffiliation. In *Sweeney*, the court held that the partisan

dismissal of "fee agents" who were independent contractors did not violate the First Amendment. In *Fox & Co.* the court reaffirmed its decision in *Sweeney* and held that dismissal of an accounting firm solely because the firm did not support the mayor did not violate the First Amendment.

The Third Circuit ruled in accord with the Eighth Circuit in *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986) (en banc) (partisan dismissal of motor vehicle agents who were independent contractors did not violate the First Amendment). The Seventh Circuit applied the rule to unsuccessful bidders in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and *Triad Assoc., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 L.Ed. 2d 97, 111 S.Ct. 129 (1990).

The Seventh Circuit in this case recognized that this Court's decision in *Rutan v. Republican Party of Illinois*, 868 F.2d 943 (7th Cir. 1988) (en banc), *rev'd*, 497 U.S. \_\_\_, 111 L.Ed. 2d 52, 110 S.Ct. 2927 (1990), *on remand*, 916 F.2d 715 (7th Cir.) (unpublished disposition), altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based, but concluded that *Rutan*, although extending First Amendment protection to applicants for employment, did not address the question of whether the same protection should be extended to independent contractors. (App. 6-8). The Seventh Circuit also noted that since *Rutan* had been decided, the Sixth Circuit had refused to prohibit the government from considering political criteria in awarding public contracts, citing *Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir. 1989), *vacated*, 882 F.2d 207 (6th Cir. 1989), *reinstated in part*, 924

F.2d 627 (6th Cir.), (en banc), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 L.Ed. 2d 1054, 111 S.Ct. 2889 (1991). (App. 7-8).

**C. The Seventh Circuit Decided The Case Correctly.**

In *LaFalce v. Houston*, 712 F.2d 292, the Seventh Circuit aptly described the differences between public employees and independent contractors in the context of the First Amendment. The differences described by the court compelled it to conclude that the protections of the First Amendment should not be extended to rejected bidders for public contracts who claim that their bids were rejected for partisan reasons. The court surmised that independent contractors tend to be less dependent upon government jobs than are public employees, have no particular political orientation, and usually have connections with both major parties to protect their business interests. *Id.* at 294. The court questioned whether court-imposed political impartiality would have much effect on the "cautious neutrality that characterizes the political activities of American business." *Id.* The court was not convinced that the consequence of eliminating patronage from public contracting was wholly desirable.\* Finally, the Seventh Circuit feared that "a decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.*

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\* See also on this point in reference to patronage employment *Rutan*, 111 L.Ed. 2d at 78-93 (dissenting opinion).

The court concluded that the "differences in strength of competing interests in the two classes of cases" were enough to convince the court not to extend First Amendment protection to independent contractors seeking governmental business. *Id.* at 295. The court was convinced that federalizing the law of public contracting to the same extent that the law of public employment had been federalized would, in light of the burdensome consequences, be of no net benefit to the nation because the court thought it unlikely that business firms which generally stay on good terms with major political groupings in society would, if protected by the First Amendment, engage in political conflict with the very groups whose business they are seeking. *Id.* at 294.

The Seventh Circuit in this case concluded that the rationale stated in *LaFalce* was still valid, except that in *Rutan* this Court expressed less concern about flooding the federal courts with new First Amendment claims than did the Seventh Circuit in *LaFalce*. (App. 7). Because *Rutan* was solely concerned with public employment, the Seventh Circuit saw no need to reexamine its decision in *LaFalce*. (App. 7-8).

In *Rutan*, this Court extended the protection of the First Amendment to applicants for public employment. This Court held that conditioning hiring decisions on political belief and association created a burden upon free expression of constitutional magnitude because (1) a government job, which provides a paycheck, health insurance and other benefits, is valuable; (2) when the private sector of the economy is slow, the only other jobs that might be available are with the government; and (3) there are certain occupations for which the government is the major or only employer. 111 L.Ed. 2d at 68.

The characteristics of government employment that swayed this Court in *Rutan* are not shared by independent contractors. Because contractors are self-employed, they neither seek nor need the security of government employment. Independent contractors generally sell their goods and services to a large number of both private and public sector purchasers. Those few contractors who sell goods or services only to the government, generally, as part of their business practice, maintain close relationships with the governments they serve. Because these distinctions are valid, this Court's decision in *Rutan* does not compel a different result in this case.

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### III. CONCLUSION

For the foregoing reasons, the writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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